Supreme Court, U.S.
FILED
MAR 2 1993
OFFICE OF THE CLERK

No. 92-1131

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM T. "TOM" HOLLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause was violated by petitioner's conviction in a single prosecution of both committing mail fraud, in violation of 18 U.S.C. 1341, and engaging in monetary transactions involving the proceeds of that mail fraud, in violation of 18 U.S.C. 1957(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 971 F.2d 1441.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1992. A petition for rehearing was denied on September 11, 1992. Pet. App. B1-B2. On December 4, 1992, Justice White extended the time for filing a petition for a writ of certiorari to and including December 30, 1992, and the petition was filed on December 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on two counts of bank fraud, in violation of 18 U.S.C. 1344; one count of submitting a false financial statement to a bank, in violation of 18 U.S.C. 1014; two counts of mail fraud, in violation of 18 U.S.C. 1341; and four counts of engaging in a monetary transaction in criminally derived property, in violation of 18 U.S.C. 1957(a).[1] He was sentenced to concurrent terms of 57 months' imprisonment on each count, to be followed by three years' supervised release. He was also fined $10,000 and ordered to pay $141,598 in restitution. The court of appeals affirmed his convictions but remanded for resentencing. Pet. App. A1-A36, D4-D8.[2]

1. Petitioner and his wife, co-defendant Pamela Sue Hollis, engaged in a bank fraud scheme and two insurance fraud schemes.

a. In April 1988, the Hollises obtained a $240,000 loan from First Interstate Bank (First Interstate) in Oklahoma City, Oklahoma, and a $147,000 loan from the Metro Area Development Corporation (MADC) to finance the

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[1] Petitioner and his wife, co-defendant Pamela Sue Hollis, were charged in a ten-count indictment. Counts 1 through 8 named petitioner and his wife; each was found guilty on all eight counts. Counts 9 and 10 charged petitioner alone with violations of 18 U.S.C. 1957(a). Petitioner was found guilty on Count 10 but acquitted on Count 9.

[2] The district court initially fined petitioner $141,598 based upon its misconception that that was the minimum fine required under the Sentencing Guidelines. The court of appeals vacated that fine and remanded for resentencing, holding that the minimum fine under the Guidelines was $10,000. Pet. App. A35-A36. In all other respects, the court of appeals affirmed petitioner's convictions and sentence. *Id.* at 30a-36a. On remand, the district court imposed a $10,000 fine.

purchase of an office building. In applying for the loans, the Hollises submitted falsified federal income tax returns for 1984, 1985, and 1986, which differed from the tax returns actually filed with the Internal Revenue Service. In particular, whereas the versions submitted to the bank reported adjusted gross incomes of more than $100,000 for each year, the versions filed with the IRS reported substantial losses for each year. Pet. App. A4. In October 1988, after obtaining the loans, the Hollises submitted a financial statement to First Interstate that overstated the amount of money that they had in various bank accounts, understated their credit card debt, and falsely stated that they owned two pieces of real estate that they did not in fact own. *Id.* at A4-A5.

The Hollises' use of false information to obtain the loans from First Interstate and MADC was the basis for the bank fraud charges in Counts 1 and 2 of the indictment. Count 3 charged them with submitting a false financial statement to a bank, in violation of 18 U.S.C. 1014.

b. Petitioner and his wife defrauded the Farmers Insurance Group of Companies (Farmers) by filing claims for items that they falsely reported were stolen during a burglary of their house. Farmers issued three checks to the Hollises in payment on those false claims. Pet. App. A5-A7.

The Hollises' defrauding of Farmers in connection with the alleged burglary of their house was the basis for the mail fraud charge in Count 4. Counts 5, 6, and 7 alleged that the Hollises knowingly engaged in monetary transactions in criminally derived property, in violation of 18 U.S.C. 1957(a), when they endorsed the three

checks from Farmers and deposited them in their own bank account. Pet. App. A5-A7.[3]

c. The Hollises also defrauded Farmers by overstating the damage suffered by their office building when it was struck by lightning. They supported the inflated damage claims, *inter alia*, by submitting false invoices for repairs that were never made and backdating a contract for installation of a security system. Farmers issued two checks in payment on the false claims. Pet. App. A7-A8.

The defrauding of Farmers in connection with the lightning strike was the basis for the mail fraud charge against the Hollises in Count 8. Counts 9 and 10 charged petitioner with violating 18 U.S.C. 1957(a) when he endorsed and deposited the two checks from Farmers. Pet. App. A7-A8.

2. The trial court instructed the jury that, to prove that petitioner and his wife violated 18 U.S.C. 1957(a) by engaging in monetary transactions in criminally derived property:

> [I]t is necessary for the United States to prove that the defendant knew that the monetary transaction involved criminally derived proceeds. It is also the government's burden to show that the proceeds were

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[3] 18 U.S.C. 1957(a) makes it a crime to "knowingly engage[] or attempt[] to engage in a monetary transaction in criminally derived property [that is] of a value greater than $10,000 and is derived from specified unlawful activity." The term "monetary transaction" means "the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds * * * by, through, or to a financial institution." 18 U.S.C. 1957(f)(1). The term "criminally derived property" means "any property constituting, or derived from, proceeds obtained from a criminal offense." 18 U.S.C. 1957(f)(2). The term "specified unlawful activity" includes mail fraud. 18 U.S.C. 1956(c)(7)(A); see 18 U.S.C. 1961(1).

> derived from a mail fraud. However, the United States is not required to prove that the defendant knew that the proceeds were from mail fraud; rather the government must establish that the defendant was aware that the proceeds were derived from some criminal offense.

Jury Instruction No. 29. This part of the instruction indicated that in order to find petitioner guilty of the Section 1957(a) charges in Counts 5, 6, 7, 9, and 10, the jury was not required to find that petitioner himself committed the mail fraud offenses charged in Counts 4 and 8, as long as it found that he knew that the proceeds (*i.e.*, the insurance checks) specified in the Section 1957(a) counts were derived from some criminal offense. Nonetheless, the trial court subsequently instructed the jury:

> [I]f you find a defendant not guilty on Count 4, then you must find him or her not guilty on Counts 5, 6, and 7. If you find [petitioner] not guilty on Count 8, then you must find him not guilty on Counts 9 and 10.

Jury Instruction No. 29. The jury convicted petitioner on both mail fraud counts and on all of the Section 1957(a) counts except Count 9.[4]

3. The court of appeals affirmed petitioner's convictions. Pet. App. A1-A36. As relevant here, it rejected his contention that the Double Jeopardy Clause protected him from being convicted in a single prosecution of both committing mail fraud and engaging in a monetary transaction involving the proceeds of that mail fraud. *Id.* at A12-A15. The court determined that petitioner's

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[4] The court of appeals believed that petitioner's acquittal on Count 9 reflected "the jury's view that a substantial amount of the proceeds of the first check [from Farmers for damage claims associated with the lightning strike] was legitimately derived." Pet. App. A8.

Double Jeopardy challenge was foreclosed by the court's prior decision in *United States* v. *Lovett*, 964 F.2d 1029 (10th Cir.), cert. denied, 113 S. Ct. 169 (1992). In *Lovett*, the Tenth Circuit held that the prosecution of both a Section 1957(a) offense and the offense that produces the proceeds used in the Section 1957(a) offense does not violate the Double Jeopardy Clause, because "Congress intended to punish both offenses separately," Pet. App. A14.[5]

ARGUMENT

Petitioner contends that the offense of engaging in a monetary transaction in property "derived from specified unlawful activity" (18 U.S.C. 1957(a)) and the underlying unlawful activity are the "same offence" under the Double Jeopardy Clause. Based on that contention, petitioner argues that the counts in the indictment charging him with Section 1957(a) offenses and mail fraud were multiplicitous (Pet. 9-23) and that his convictions on those counts were unconstitutional (Pet. 23-27). The court of appeals correctly rejected those arguments and held that the monetary-transaction offense proscribed in Section 1957(a) and the offense of mail fraud are separate offenses under the Double Jeopardy Clause.

In the context of a single prosecution, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the

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[5] With the exception of petitioner's challenge to the fine initially imposed by the district court, see note 2, *supra*, the court of appeals also rejected petitioner's other challenges to his convictions and sentence. See Pet. App. A8-A12 (sufficiency of evidence), A15-A19 (jury instructions), A19-A24 (alleged prosecutorial misconduct), A25-A26 (supplemental jury instruction), A26-A29 (joinder of offenses), A29-A30 (alleged violation of privilege against compelled self-incrimination). Petitioner does not renew those challenges in this Court.

legislature intended." *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983) (quoted in *Grady* v. *Corbin*, 495 U.S. 508, 516-517 (1990)); see *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981). Thus, the question whether multiple convictions arising from a single prosecution violate the Double Jeopardy Clause is solely one of legislative intent. See, *e.g.*, *United States* v. *Woodward*, 469 U.S. 105, 108-109 (1985) (per curiam); *Albernaz*, 450 U.S. at 340. In federal prosecutions, it is presumed in the absence of evidence to the contrary that Congress intends to permit multiple convictions for a single act that violates two statutes if each statute "requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). Under the *Blockburger* test, the statutory elements of the offense govern; the fact that in a particular case there was an overlap in the proof offered to establish the crimes is irrelevant. *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975).[6]

Sections 1957(a) and 1341 describe separate offenses under the *Blockburger* test. A conviction under Section 1957(a) requires proof of facts not required to prove mail fraud. Specifically, to violate Section 1957(a), a defendant must have engaged in a "monetary transaction in criminally derived property [that is] of a value greater than $10,000 and is derived from specified unlawful activity." No proof of a monetary transaction is required for a conviction under the mail fraud statute. Similarly, a conviction for mail fraud requires proof of facts—such as

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[6] Petitioner's heavy reliance on *Grady* v. *Corbin*, 495 U.S. 508 (1990), is misplaced. Unlike this case, which involves convictions imposed in a single prosecution, *Grady* involved convictions imposed in successive prosecutions. The Court's analysis in *Grady* applies solely to successive prosecutions, which the Court explained "raise concerns that extend beyond merely the possibility of an enhanced sentence." *Id.* at 518.

a use of the mails and a scheme to defraud—that is not required for a conviction under Section 1957(a).

To be sure, mail fraud is a "specified unlawful activity" for purposes of Section 1957(a); thus, the knowing use of the proceeds of a mail fraud in a monetary transaction can violate Section 1957(a). But Section 1957(a) can also be violated by using the proceeds of many crimes other than mail fraud. 18 U.S.C. 1961(1); 18 U.S.C. 1956(c)(7). Moreover, even where, as here, a criminal defendant is charged with both committing mail fraud and engaging in a monetary transaction involving the proceeds of that mail fraud, conviction of the monetary-transaction offense does not require proof that the defendant himself committed the mail fraud offense. Rather, a defendant can violate Section 1957(a) by engaging in a monetary transaction involving property that he knows is the proceeds of a mail fraud committed by someone else. Thus, the government was not required to prove that petitioner was guilty of the mail fraud offenses charged in Counts 4 and 8 in order to prove him guilty of the monetary transactions associated with those mail fraud schemes charged in Counts 5, 6, 7, 9, and 10; put another way, the mail fraud offenses were not lesser included offenses of the monetary-transaction offenses.[7]

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[7] Petitioner errs in relying (Pet. 17) on a portion of the jury instructions (see p. 5, *supra*) stating that the jury was required to find petitioner guilty of the mail fraud offenses before it could find him guilty of the monetary-transaction offenses. That is a misstatement of the law, as explained in the text, *supra*, but it favored petitioner and therefore cannot be the basis for affording him relief. In any event, the district court's legal error does not alter Congress's intention to allow separate punishments for the offense of engaging in a monetary transaction in property "derived from specified unlawful activity" (18 U.S.C. 1957(a)) and the underlying unlawful activity.

Petitioner's Double Jeopardy claim would fail even if mail fraud were considered a lesser included offense of Section 1957(a) under the *Blockburger* test. Since Congress may "punish[] separately each step leading to the consummation of a transaction * * * [and] also the completed transaction," *Garrett* v. *United States*, 471 U.S. 773, 779 (1985), the ultimate question is whether Congress intended to impose separate punishments for engaging in both a Section 1957(a) offense and the "unlawful activity" underlying the Section 1957(a) offense. The Tenth Circuit correctly answered that question in the affirmative in *Lovett*, where it held that "Congress intended § 1957 to be a separate criminal offense which is punishable in addition to the underlying 'specified unlawful activity.'" 964 F.2d at 1042 (quoting 18 U.S.C. 1957(a)).

Petitioner's reliance (Pet. 23-27) on *United States* v. *Seda*, 978 F.2d 779 (2d Cir. 1992), is misplaced. In *Seda*, the Second Circuit held that an indictment was multiplicitous in charging the defendant with committing bank fraud, in violation of 18 U.S.C. 1344, and making false statements to the bank in connection with loan applications, in violation of 18 U.S.C. 1014. 978 F.2d at 781-782. We disagree with that holding, for the reasons set forth in the dissenting opinion in *Seda*. As the dissent explained, the majority in *Seda* erred when, in applying the *Blockburger* test, it considered the facts of the case before it. 978 F.2d at 782-783 (Kearse, J., dissenting). In any event, *Seda* is inapposite because it did not involve the statutes that are claimed in this case to constitute the "same offence" under the Double Jeopardy Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1993